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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ABBEY NURSING HOME, INC.
AND MAX A. STRAUSS,

Petitioners,

vs.

ESTATE OF ALMA RICHARDSON,
VERNEDA BENTLEY, ADMINISTRATRIX,

Respondent.

ON WRIT OF CERTIORARI
TO THE OHIO EIGHTH DISTRICT
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and therefore a denial of Due Process¹ for a state court to permit a civil jury to render a monetary judgment for punitive damages against a defendant, including in such judgment plaintiff's reasonable attorney fees, where the plaintiff fails to present any proof to demonstrate the reasonable value of such legal services performed by plaintiff's attorney?

¹ As used in this Petition, the term "Due Process" means Due Process of law as guaranteed to Petitioners herein by the Fourteenth Amendment to the United States Constitution. That term, further, is intended to include, wherever applicable, the constitutional concept of "Equal Protection of the Laws," which has traditionally been held to be one of the elements included within the concept of "Due Process."



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ON WRIT OF CERTIORARI
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OPINIONS BELOW

Denial of Motion for Rehearing in the
Supreme Court of Ohio, Ohio Supreme Court
Case No. 84-264, May 23, 1984.

Denial of Motion to Certify in the Supreme
Court of Ohio, Ohio Supreme Court Case No.
84-264, April 18, 1984.

Estate of Alma Richardson, Verneda Bentley
Administratrix, Ohio Eighth District Court,
of Appeals, Cuyahoga County, Unreported
Case No. 46126, December 19, 1983.



JURISDICTIONAL STATEMENT

The date of the judgment or decree of the Ohio Supreme Court sought to be reviewed is April 18, 1984, rehearing having subsequently been denied by the Ohio Supreme Court on May 23, 1984. The date of the judgment or decree rendered in the Ohio Court of Appeals is December 19, 1983. The statutory provision believed to confer upon this court jurisdiction to review the judgment or decree in question by Writ of Certiorari is 28 USC §1257(3), which permits review of final judgments, rendered by the highest court of a state in which a decision could be had, where a right is specially set up or claimed under the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case of apparent first impression before this Honorable Court involves the application of the Due Process clause of



the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

***No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without Due Process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1974, Petitioner Abbey Nursing Home, Inc. [hereinafter "Abbey"] leased a state licensed nursing home in Cleveland, Ohio, and immediately upon occupation of the 75-year-old structure, undertook a comprehensive 5-year plan to improve patient conditions and remodel the premises. On February 3, 1978, during the Seven Hundred Thousand Dollars (\$700,000.00) improvement project, Mrs. Alma Richardson was admitted to Abbey Nursing Home by her daughter.

As a result of the (alleged) mistreatment of Mrs. Richardson by staff at Abbey, Mrs. Richardson suffered numerous (alleged) injuries and damages and she left the nursing home, later dying of unrelated causes.

An action was commenced in the Court of Common Pleas of Cuyahoga County, Ohio with the filing of a complaint against several defendants, including Petitioners Abbey and Max A. Strauss, the administrator of Abbey, and was prosecuted by the Administratrix of Mrs. Richardson's estate, Respondent herein. Following trial, a verdict and judgment for compensatory damages of Three Thousand One Hundred Eighty-eight Dollars (\$3,188.00) was returned in favor of Respondent. The issue of punitive damages was not sent to the jury. [See appendix, Exhibit N]. Upon appeal to the Ohio Court of Appeals by both parties, the judgment of the trial court was reversed



and the case was remanded for a new trial. [See Appendix, Exhibit M]. Motions to certify and appeals to the Ohio Supreme Court were dismissed. [See Appendix Exhibits L, K, J, I, H]. Upon retrial, the trial court charged the jury that they could, in their verdict, include as punitive damages an amount to compensate Respondent for Respondent's reasonable attorney fees incurred in prosecuting the action, notwithstanding Respondent's failure to present any evidence of the services performed by Respondent's attorney or their reasonable value. In its charge, the Court stated:

"Now, if you award punitive damages, the amount should be fair and reasonable under all the facts and circumstances, and should not be excessive, nor actuated by passion or prejudice. The amount of punitive damages rests in the sound judgment of the jury and should be determined from all of the evidence in the case. If no amount is awarded for punitive damage, "none" in lieu of an amount in the space provided.

If you award punitive damage, you may consider and include in the award for actual damage a reasonable amount for the attorney fees of counsel employed by the plaintiff in the prosecution of this action.
(Tr. 2150, 2151, emphasis added).

Petitioners objected to the charge,
stating:

Mr. Orkin: The Defendants, Max M. Strauss and Abbey Nursing Home, have two objections: (1) Since no proof of attorney fees, if punitive damages are awarded, the jury should be instructed not to consider attorney fees without some proof of what those fees are.

"To let the jury speculate is also a denial of Due Process of law, and denies the Defendants the right to face this accusation and reasonably cross-examine or offer contrary evidence. (Tr. 2120)."

Petitioners' objection was summarily overruled by the trial court. The jury returned a verdict against Petitioners for Seventy-five Thousand Dollars (\$75,000.00) compensatory damages, and Three Hundred Thousand Dollars (\$300,000.00) as punitive damages. [See Appendix, Exhibit G].



Following a remittitur of One Hundred Twenty-five Thousand Dollars (\$125,000.00) of the punitive damage award [see Appendix, Exhibits F, E], Petitioners appealed to the Ohio Eighth District Court of Appeals, setting forth errors which were committed by the trial court which denied Petitioners a fair trial, including the issue raised herein with respect to the trial court's unconstitutional instruction to the jury that they might award as an aspect punitive damages, a speculative amount for Plaintiff's reasonable attorney fees incurred in this action, in the absence of proof of what those fees are or reasonably should be. Such error was raised in Petitioners' Assignment of Error No. XXXIII, filed May 2, 1983, and Petitioners' Assignment of Error No. 30, filed June 17, 1983. A divided Court of Appeals



affirmed the judgment of the trial court, a majority finding that due to the remittitur Petitioners were not prejudiced by the absence of evidence of attorney fees. [See Appendix, Exhibit D]. The Honorable Saul Stillman filed an opinion concurring in the compensatory damage judgment and dissenting on the ground that punitive damages should not have been considered or awarded by the jury under the circumstances, and on the ground that the verdict form awarding punitive damages was defective. A Notice of Appeal as of right and a Memorandum in Support of Jurisdiction to the Ohio Supreme Court were filed, with the trial court's deprivation of Due Process and a fair trial set forth as error in Proposition of Law No. 4 in such Memorandum. [Ohio Supreme Court Case No. 84-264].

Subsequently, upon the determination of a Motion requesting the Court of Appeals

to Certify the case to the Ohio Supreme Court, and while the appeal to the Supreme Court was pending, the Ohio Court of Appeals, sua sponte, modified its opinion on the basis of "clerical error" by retracting a separate concurring opinion of one of the two Court of Appeals judges who voted for affirmance. [See Appendix, Exhibit C]. A second Notice of Appeal as of right to the Ohio Supreme Court was filed from the nunc pro tunc entry and withdrawing such separate concurring opinion. [Ohio Supreme Court Case No. 84-711]. Thereafter, the Ohio Supreme Court sua sponte dismissed the first appeal "for the reason that no substantial constitutional question exists herein." (Ohio Supreme Court Case No. 84-264) [see Appendix, Exhibit B], and a Motion for Rehearing in the Ohio Supreme Court was overruled [see Appendix, Exhibit A].



At the time of the filing of this Petition, the second appeal (Ohio Supreme Court Case No. 84-711) remains pending in the Ohio Supreme Court. In this Petition, this Court is asked to vacate the judgment of the Court of Appeals on the ground that Petitioners were denied a fair trial as guaranteed by the Due Process clause.

REASONS FOR GRANTING THE WRIT

It is error and a denial of a fair trial as guaranteed by the Due Process clause of Section 1 of the Fourteenth Amendment to the United States Constitution for a state court to allow a civil jury to render a monetary judgment against a defendant, including therein an amount for plaintiff's reasonable attorney fees, where the plaintiff fails to present any proof to demonstrate the reasonable value



of the services performed by plaintiff's attorney.

It is through the disposition of this federal question in a way which conflicts with the United States Constitution that the Ohio Courts have denied Petitioners Due Process and a fair trial.

The Due Process clause of the Fourteenth Amendment prohibits state governments from depriving any person of life, liberty or property without Due Process of law. The Due Process guarantee requires a fundamentally fair proceeding in which each litigant has the opportunity to present his case and have its merits fairly judged. See Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 102 S.Ct. 1148, 1156. When a state uses its enforcement power to transfer property from one person to another, whether as compensatory or punitive damages, the requirements of



fundamental fairness and procedural Due Process must be met.

In Matthews v. Eldridge (1976) 424 U.S. 319, 96 S.Ct. 893, the Supreme Court set forth a three-part test for determining the level of procedural protection afforded in a particular case by the Due Process clause. In Matthews, the Court stated:

"[I]dentification of the specific dictates of Due Process generally requires the consideration of three distinct factors: First, the private interest that will be affected by the official action; Second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 335 (citation omitted).



Applying the factors set forth in Matthews with respect to the issue raised in the case at bar, the private interest which is affected by the official action is a vested property interest and the incident right that such property not be arbitrarily transferred as compensation to another person without a showing of how much is necessary for fair and full compensation. With respect to the second factor set forth in Matthews, where a jury is permitted to arbitrarily speculate as to the amount necessary to compensate a plaintiff for plaintiff's reasonable attorney fees, the risk that the jury might erroneously arrive at an amount which is greater or less than the reasonable value of plaintiff's attorney fees is so great as to require no elaboration here. With evidence there is no speculation.



Lastly, with respect to the fourth factor set forth in Matthews, the state government's interest in relieving a plaintiff of the burden of proving the reasonable value of plaintiff's attorney fees is insubstantial at best, and the additional judicial resources required to enable the presentation of evidence, cross-examination and rebuttal on the issue of reasonable attorney fees are de minimus and overwhelmingly outweighed by the benefits of ensuring an accurate verdict and fair trial.

The argument that the jury can adequately gauge the reasonable value of the attorney's services from the services rendered in the jury's presence at trial is neither realistic nor persuasive.

The overruling of Petitioners' objection to the jury charge of the trial court violated fundamental fairness and the Fourteenth Amendment to the United States

Constitution. The denial (taking) of property without the presentation of any evidence for a jury to consider cannot be a fundamentally fair proceeding and is of constitutional dimension. The denial of such a protected federal constitutional right should give rise to a presumption that Petitioners did not have a fair trial.

While the doctrine of punitive damages is recognized in approximately forty-four (44) out of the fifty states, there have been some limitations, statutory or otherwise, placed upon such awards due to their frequently all too arbitrary nature.

We do not ask this Court to rule on the constitutionality of punitive damages, per se. See M. Wheeler, The Constitutional Case for Reforming Punitive Damage Procedures, 69 Vir. L. Rev. 269 (1983). Clearly, there have been abuses as reflected by

the large amount of remittiturs. We respectfully request that where there is available proof of damages, such as the proof which is required by the "Lodestar" analysis employed in attorney fee cases in federal courts [i.e., Hensley v. Eckerhart (1983) ____ U.S. ___, 103 S.Ct. 1933, 1937 n.3; Ramos v. Lamm (10th Cir. 1983) 713 F.2d 546; New York State Assoc. for Retarded Children, Inc. v. Carey (2nd Cir. 1983) 711 F.2d 1136], such proof should be admitted into evidence with the adverse party given the opportunity of cross-examination and rebuttal.

This case presents an issue of national importance, and presents this Court with an opportunity to take a first step to impose a fundamentally fair restriction on the method by which a court may award attorney fees to the prevailing party as a part of punitive damages awardable. In recent years, this Honorable Court has



joined with other federal and state courts in recognizing the arbitrariness and prejudice in many punitive damage awards.

See I.B.E.W. v. Foust (1979) 442 U.S. 42, 50 & n.14, 99 S.Ct. 2121; Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 350, 94 S.Ct. 2997. As pointed out by Justice Marshall in Rosenbloom v. Metromedia, Inc. (1971) 403 U.S. 29, 84, 91 S.Ct. 1811, with most punitive damage awards "the essence of the discretion is unpredictability and uncertainty." Like Ohio, at least thirteen (13) states, and indeed some federal courts [i.e., Afro-American Publishing Co., Inc. v. Jaffe (D.C. Cir. 1966) 366 F.2d 649] have allowed a jury to speculate and arbitrarily compensate a plaintiff for plaintiff's attorney fees through an award of punitive damages, without requiring any proof of the reasonable value of those fees. See Annot., Attorney Fees Or Other Expenses of Liti-



gation As An Element In Measuring Exemplary Or Punitive Damages, 30 A.L.R.3d 1443. This is so, notwithstanding this Court's long standing admonition, in Day v. Woodworth (1851) 13 How. 363, 14 L.Ed. 181, that counsel fees are not properly taken as the measure of punishment or a necessary element in its infliction. Because punitive damage actions are quasi-criminal in nature and only nominally civil [see Smith v. Wade (1983) ____ U.S. ___, 103 S.Ct. 1625, 1641, J. Rehnquist, dissenting], the absence of cross-examination plainly implicates the more specifically criminal procedural safeguard of confrontation. ["In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." Amendment 6, United States Constitution].

It is in recognition of this unfairness that enlightened courts have refused to



permit an award of attorney fees, whether allowed as compensatory or punitive damages, absent proof of the reasonable value of such fees. In Connecticut and Texas, where an award of punitive damages may include reimbursement of Plaintiff's attorney fees, strict proof of those fees is required. In Kelsey v. Connecticut State Employees' Association (1980) 179 Conn. 606, 427 A.2d 420, the court held under Connecticut law that before the jury may be permitted to award punitive damages reimbursing the plaintiff's attorney fees, proof of those fees and their reasonable value must be adduced. In Security State Bank v. Spinnler (1932) 55 S.W.2d 128, and in Southwestern Investment Company v. Neeley (1967) 412 S.W.2d 925, the Texas Court of Civil Appeals held under Texas law that attorney fees may be considered by the jury in determining the amount of punitive damages only where those fees are



properly alleged and proved.

The Supreme Court of South Dakota has recognized that procedural Due Process and fundamental fairness preclude an award of attorney fees without proof of those fees in divorce actions. See Brennan v. Brennan (1974) 88 S.D. 541, 224 N.W.2d 192. In Sparks v. Republic National Life Insurance Co. (1982) 132 Ariz. 529, 647 P.2d 1127, the Arizona Supreme Court also recognized that procedural Due Process was satisfied where the defendant had an opportunity to cross-examine plaintiff's witnesses and to present evidence in rebuttal on the issue of the reasonable value of plaintiff's attorney fees. In Sparks, the Supreme Court emphasized that Due Process requires that a party be given notice and an opportunity to be heard, and that "to give substance to the hearing, the court must consider and appraise the



evidence which justifies its determination."

The rule in Ohio, as set forth by its Supreme Court, does not require, and in fact precludes, the admission of evidence of attorney fees in cases involving punitive damages. Roberts v. Mason (1859) 10 Ohio St. 277. This is so, notwithstanding the Ohio Supreme Court's inability to agree as to whether such attorney fees are technically allowable as compensatory, or as punitive, damages [See Roberts v. Mason, supra, (compensatory); Finney v. Smith (1877) 31 Ohio St. 529, 27 A.R. 524 (compensatory); United Power Co. v. Methany (1909) 81 Ohio St. 204, 90 N.E. 154 (compensatory); Columbus Finance v. Howard (1975) 42 Ohio St. 2d 178, 327 N.E.2d 654 (punitive, dictum); Smithhisler v. Dutter (1952) 157 Ohio St. 454, 105 N.E.2d 868; Peckham Iron Co. v. Harper

(1884) 41 Ohio St. 100, 52 A.R. 71 (punitive)], and notwithstanding the fact that the defending party is thereby denied the benefit of the well settled right, recognized in similar cases involving compensatory damages, that property not be denied without the presentation of substantive proof.

The fundamentally unfair nature of a rule which permits an award of attorney fees without proof of what those fees are, or reasonably should be, has been recognized by the very Ohio District Court of Appeals which rendered the judgment sought to be reviewed herein, if not by the Ohio Supreme Court. In Pyle v. Pyle (1983) 11 Ohio App. 3d 31, 463 N.E.2d 98, the Ohio Eighth District Court of Appeals held that proof of attorney fees must be adduced in cases involving punitive damages.



In Swanson v. Swanson (1976) 48 Ohio App.2d 85, 355 N.E.2d 894, a case not involving punitive damages, the Ohio Court of Appeals held that at least eight (8) factors must be considered in determining the reasonable amount of attorney fees to be awarded in a divorce action. The Swanson court held that the initial factors to be taken into account in determining the reasonable amount of attorney fees to be awarded are the time and labor expended by the attorney, and the reasonable value of such labor. Because proof of reasonable attorney fees is required in cases not involving punitive damages, and because there is no rational basis which supports the rule which does require proof of attorney fees in cases which do involve punitive damages, Petitioners have also been denied the equal protection of the laws as guaranteed by Due Process and the



Fourteenth Amendment.

CONCLUSION

The Ohio Rule permitting an award of attorney fees as part of punitive damages without any evidence of their value has never been assailed on Due Process grounds. Preliminary research on this issue fails to disclose that such a rule has ever been tested on Federal Due Process grounds. Thus, this case presents to this Court a narrow issue of first impression and national importance under the Fourteenth Amendment.

This Court often decides criminal cases and thereby limits the rights of states to enforce criminal laws. It is respectfully submitted that awards of punitive damages are quasi-criminal in nature and since this issue is apparently one of first



impression, the Court should grant certiorari and establish constitutional limitations on such awards as a matter of public policy. Where one party must pay another party's attorney fee, the attorney fee should and must be proven by at least the same degree of evidence as required if it were a lawsuit by the attorney to collect from his own client.

For the foregoing reasons, Petitioners have been denied property without the presentation of evidence or a fundamentally fair procedure in violation of the Due Process guarantee of the United States Constitution. This Honorable Court is respectfully requested to vacate the decision of the Ohio Eighth District Court of Appeals affirming the punitive damage judgment of One Hundred Seventy-five Thousand Dollars (\$175,000.00) which was



rendered against Petitioners Max A.
Strauss and Abbey Nursing Home, Inc.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, LOUIS H. ORKIN, Counsel for Petitioners, Max A. Strauss and Abbey Nursing Home, Inc., and a member of the Bar of the Supreme Court of the United States, certify that on July 16, 1984, I served three copies of the foregoing Petition for Writ of Certiorari with Appendix on Nicholas M. DeVito, Esq., Attorney for Respondents, by delivering the same to his office at 1000 Terminal Tower, Cleveland, Ohio 44113.



LOUIS H. ORKIN, ESQ.
Counsel of Record for Petitioners